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IN THE

United States Supreme Court

ROBERT F. FRIEMANN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF FOR THE PETITIONER

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OCTOBER TERM, 2005

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STATEMENT

Respondent's Opposition Brief urges that the *Friemann* petition should be held in abeyance pending the Court's decision in *Zedner v. United States*, No. 05-5592, which is scheduled for argument during the week of April 17, 2006. The two issues presented in *Zedner* involve (i) whether Zedner should be held to have waived his right to complain about not receiving a speedy trial within the 70-day limitation imposed by the Speedy Trial Act ("STA"), 18 U.S.C. § 3161, and (ii) assuming there was no effective waiver by Zedner of his rights under the STA, whether the violation of Zedner's STA rights can properly be deemed to consti-

tute "harmless error" and not require dismissal of the indictment.

Friemann, whose petition presents the same issues, opposes Respondent's suggestion, and, instead for the reasons set forth below, urges the Court to grant Friemann's petition and consolidate *Friemann* for argument with *Zedner*. The *Zedner* merits brief is due February 21, 2006. Petitioner is prepared to file his merits brief with but a week's notice from the Court's order, in order to be heard jointly with *Zedner*.

In the alternative, petitioner requests that our petition for certiorari—which demonstrates how a peripheral defendant in a multi-defendant case can be overlooked, and forgotten, by the district court—be treated as an *amicus* submission in *Zedner*.

DISCUSSION

As noted both cases present the same two STA issues—waiver and harmless error. Although petitioner is not yet fully aware of the precise arguments which will be advanced by Zedner's counsel in his merits brief, petitioner has adopted Zedner's legal arguments as set forth in his petition for certiorari and is not contemplating a duplication of Zedner's discussion of the law or the issues. However, the *Friemann* record presents to the Court a far more simple, clear-cut fact pattern, which, we believe, will facilitate the Court's analysis when deciding these issues. Furthermore, while we argue, like *Zedner*, that there can be no non-statutory waiver under the STA (Pet. 15-18) it is conceivable that, on *Zedner's* facts, there could be an affirmance based on "waiver" without reaching harmless error issue. *Friemann* presents facts that are undisputed and, we

believe, point clearly to a conclusion of "no waiver" as a matter of law, and, accordingly, the harmless error issue, which is so important to the administration of the STA, will very likely be squarely before the Court.

A. The "waiver" in *Zedner*

Zedner presents a hodgepodge of facts upon which the Respondent will rely to argue the correctness of the Court of Appeals finding that Zedner waived his STA rights. Such facts include Zedner's execution of a "waiver for all time"; Zedner's January 31, 1997 request for delay and his counsel's May 2, 1997 application to be relieved as counsel; and the August 2000 unavailability of both Zedner (found not competent) and his counsel (pregnancy). See *Zedner* 401 F3d at 40-41.

B. The "waiver" in *Friemann*

In contrast, the *Friemann* record clearly establishes that this petitioner never sought to delay his trial except on two occasions:

The first occurred on January 15, 2003, when, with the prosecuion's consent, Mr. Friemann was granted a severance from the co-defendants' (Isernio and Igoglia) trial, then in jury selection (Pet. App 28a).

The second occurred on June 27, 2003, when, following the mistrial with respect to Isernio (hung jury), Mr. Friemann's counsel proposed a motion schedule to narrow the charges as a result of exonerating witness testimony revealed at the Isernio trial. However, Friemann's proposal became moot when the prosecution failed to return a superseding indictment that was expected to narrow the

charges within the time period promised to the Court. (Pet. App.41a-44a)

At that point, faced with at least four months of further delay, Friemann filed his motion for dismissal under the STA rather than await the outcome of *two* Isernio trials—a lengthy retrial of S-2 and a trial upon a newly returned indictment (No. 03CR866) scheduled to begin in January 2004. (Pet.App.47a-54a)

Despite the filing of Friemann's speedy trial motion on September 18, 2003, the district court did not render a decision on that motion until another five months had elapsed, that is, on February 26, 2004, a fact omitted by the government's opposition to our petition (Pet. App.103a). During that five month period Mr. Isernio was tried and convicted on the new indictment, 03CR866, and pled guilty to S-3 (successor to S-2) on January 27, 2004.

On March 29, 2004 the district court held a telephone conference and confronted Friemann's counsel with the choice of either waiving his client's right to speedy trial or selecting a jury the following day (Pet. App.114a-115a). Counsel refused to waive his client's right, and proceeded to jury selection the following day, another fact omitted in the government's opposition to our petition.

On April 14, 2004, Friemann was acquitted of seven of the eight counts on which he was tried. The acquittals exonerated Friemann of the corruption charges, but left him convicted of improperly causing a home office deduction to be claimed on a partnership return.

C. The harmless error issue

Another reason for jointly hearing *Friemann* with *Zedner* consists of the fact that the Court of Appeals' application of "harmless error" in Friemann has drawn the teeth of the STA. In *Zedner* the Court of Appeals applied harmless error to prevent what it characterized as "perverse outcomes." It found that dismissal of the *Zedner* indictment was not warranted under the STA where, according to the Second Circuit, the record showed that "the court's failure to start a trial during a period when the trial could not have been conducted—because Zedner was not competent to stand trial and Zedner's counsel was not available. Zedner has failed to put forth any convincing argument that this delay prejudiced him at his trial." See 401 F3d at 47-48.

In *Friemann* the Court of Appeals went further and engaged in speculation based upon a hypothetical scenario to avoid dismissal of the indictment. The Court held that "assum[ing] *arguendo* that Friemann's speedy trial rights were violated," the error was "harmless" because it was "likely" that Friemann would have been re-indicted had the speedy trial motion resulted in a dismissal without prejudice (Pet. App.4a-5a). Thus, the Second Circuit's standard to prevent "perverse outcomes" has now been extended to "likely" speculation, in order to avoid the sanction of dismissal.

Friemann adds to the foundation for the Court's consideration of the harmless error issue. As Justice Blackmun noted in *United States v. Taylor*, 487 U.S. 326, 342 (1988): "Dismissal without prejudice is not a toothless sanction: it forces the Government to obtain a new indictment if it decides to reprosecute...." Contrary to the Court of

Appeals holding, Friemann can demonstrate that re-indictment of him was [and is] not "likely" (See Pet. 23-24), and that the Court of Appeals has effectively read the mandatory dismissal sanction out of the Speedy Trial Act. It has, in short, gutted this statute.

Should this Court uphold the Court of Appeals' finding of "waiver" in *Zedner*, then Zedner's "harmless error" issue would fall as moot. At the same time, a finding of "no waiver" in *Friemann* would require this Court to decide the "harmless error" issue.

For these reasons, we urge the Court to grant certiorari, and order that *Friemann* be consolidated with *Zedner*.

CONCLUSION

For the foregoing reasons, it is respectfully suggested that the Court should grant certiorari and consolidate this matter for argument with *Zedner*. In the alternative, we respectfully request that, at the least, the Court consider our petition, appendix and reply as, in effect, an *amicus* submission in *Zedner*.

Dated: February 6, 2006

Respectfully submitted,

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